IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 619

STEVE ASHTON ----------PETITIONER

against

COMMONWEALTH OF KENTUCKY ----------RESPONDENT

BRIEF FOR THE RESPONDENT

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TABLE OF CASES AND OTHER AUTHORITIES

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AGAINST

COMMONWEALTH OF KENTUCKY ..... *Respondent*

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Petitioner, Steve Ashton, was a student at Oberlin College in Ohio when he came to Hazard, Kentucky, in February of 1963 to give aid to striking miners. After a short stay in the community he composed and published under date of March 22, 1963 a pamphlet entitled "Notes On A Mountain Strike" (R. 127-137) in which he made libelous and defamatory statements regarding the Hazard Police Chief, the Sheriff of Perry County and a co-owner and publisher of the Hazard Herald newspaper. (R. 122, 123).

It was alleged that the chief of police had violated the law by taking a private job consisting of guarding a mine operator's home. It was also imputed to the police chief that he was connected with an alleged plot to kill the only pro-strike policeman on the Hazard force, which was foiled by the pickets who posted guard over the intended victim.

It was said of the sheriff that he was fined for intentionally blinding a boy with tear gas and beating him while he was locked in a jail cell with his hands cuffed, whereby the boy lost the sight of one eye. The sheriff was alleged to have offered the boy a large sum of money to keep the matter out of court. It was further alleged that the sheriff bought off a jury, and was fighting the pickets in the strike. Allegations regarding the owner of the newspaper imputed to her a breach of a public trust as to funds sent to the newspaper to be distributed among the pickets.

The statements about the police chief and the sheriff were shown to be substantially false and petitioner does not question the sufficiency of the proof of falsity as to the two officials. A question is raised regarding the truth of the statements concerning the newspaper publisher.

Petitioner was convicted in the Perry Circuit Court of the *common law crime of criminal libel* and his punishment fixed at a fine of $3,000 and six months in jail. On June 18, 1965 his conviction was affirmed by a 4-3 vote of the Court of Appeals. (R. 144-158). The dissent of three judges was on the ground that:

> "since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky." (R. 158).

SUMMARY OF ARGUMENT

1. Kentucky did not adopt the English common law of criminal libel. The holdings of the criminal libel cases decided by the Kentucky Court of Appeals establish the four essential elements of the common law offense in this state.

The Court of Appeals in this case recognized the fundamental requirements. The Kentucky opinions sufficiently define the conduct prohibited and indicate the conduct permitted, and the Kentucky common law crime is not unconstitutionally vague.

2. The "clear and present danger" test is not applicable to criminal libel. The Kentucky common law offense satisfies the relevant constitutional standards prescribed by this Court for libel prosecutions.

3. The Kentucky criminal libel law is designed to protect individual reputation. Defamation of public officials published with knowledge of falsity or a reckless disregard for the truth may constitutionally be punished as a crime. Although prevention of breach of the peace is no longer the basis for criminality, private libel should be subject to penal sanctions under the Kentucky common law in order to deter commission of harm disturbing the community's sense of security, such as malicious character assassination by publication of calculated falsehoods by impecunious persons.

4. The trial court properly defined the crime and its elements in instructions to the jury and the charge was not unconstitutionally vague. An additional instruction that criminal libel is a writing calculated to cause a breach of the peace fitted the evidence in this case. Such instruction was not necessary and was favorable to petitioner since it required an additional finding by the jury.

5. The Court of Appeals did not in its opinion in this case declare that it is unconstitutional to punish as a criminal libel a defamatory publication which has the effect of inciting a breach of the peace. Although the concept of disturbance of the peace is now obsolete, criminality under the Kentucky common law of libel was never based on the impact of the defamatory words. The trial court's instructions constituted a

narrower interpretation of the law than was necessary for conviction.

6. The statements made about Mrs. Nolan, the newspaper owner, were false.

7. There was sufficient evidence to justify a conclusion that the publication as to the officials was made with "actual malice" in that the statements were published with a reckless disregard for the truth.

8. There was sufficient evidence that the pamphlet was published.

9. Criminal sanctions are required where defamatory statements about the official conduct of officials are published with knowledge of falsity or an utter disregard for the truth.

ARGUMENT

POINT I

A. THE KENTUCKY COMMON-LAW OFFENSE OF CRIMINAL LIBEL, AS DECLARED IN EARLIER CASES AND BY THE KENTUCKY COURT OF APPEALS IN THIS CASE, IS NOT UNCONSTITUTIONALLY VAGUE AND DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF THE PRESS IN PUNISHING EXPRESSION THAT DOES NOT PRESENT A SERIOUS AND IMMINENT DANGER TO THE COMMUNITY.

Petitioner contends that the common law offense of criminal libel is unconstitutionally vague in that it has not been defined in such a manner that men of ordinary understanding can know with reasonable certainty the conduct condemned. *Winters v. New York*, 333 U.S. 507; *Cox v. Louisiana*, 379 U.S. 536. It may be assumed that a common

law crime must conform to the constitutional requirement of definiteness which has been applied to statutes, although, as the Court of Appeals noted, there is no case which has decided this particular point. (R. 146)

It has been stated that the offense of criminal libel did not originate as a part of the early common law but was created by the Court of the Star Chamber in England around the year 1600.

> "The law of criminal libel, however, owes its origin not to the early common law but rather to an innovation in Star Chamber whereby elements of Roman law were employed as the basis for prosecuting the publishers of defamatory statements. Star Chamber reasoned that such defamations tended to cause breaches of the peace. Since the tendency to provoke a breach of the peace was regarded as the gist of the crime, whether the 'libel' was true or false was considered immaterial. In fact, it was reportedly said that 'the greater the truth the greater the libel,' the statement being justified on the ground that persons whose faults had been exposed were more likely to assault the publisher than were the victims of fictitious accusations.
> In the latter part of the seventeenth century, following the abolition of Star Chamber, jurisdiction over criminal libel devolved upon the common law courts. . . ."[1]

Falsity of the defamatory words was not an element of the English common law crime and was not required to

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[1]Constitutionality of the Law of Criminal Libel, 52 Columbia Law Review, 521, 522 (1952). Garrison v. Louisiana, 379 U. S. 64. A distinction was recognized between defamation of a public official, which was seditious libel punished as a scandalous attack on the government, and defamation of a private person in which the justification for the offense was the tendency of the words to incite a breach of the peace. Brandt, Seditious Libel; Myth and Reality 39 N.Y.U.L.R. 1 (1964); Plucknett, A Concise History of the Common Law (5th Ed.) p. 489.

be established for conviction. There was no right to present to a jury the vital question of whether the published matter was libelous. Malice was not an element of the offense, or at least was conclusively presumed.

The first constitution adopted by Kentucky when it became a state in 1792 altered the common law by providing that in all indictments for libel the jury shall have the right to determine the law and the facts, and the truth may be given in evidence in cases involving public officers or matter of public interest.[2] The same provision appears in the present state constitution.[3] The fact that libel adversely affecting an individual's reputation has never been regarded as a "trifling abuse of the right of expression"[4] is perhaps evidenced by the assertion made at the Constitutional Convention of 1890 that libel is "worse than murder."[5]

It is certain that the English common law offense of criminal libel was not adopted in Kentucky. Petitioner argues that the Kentucky common law crime has never been

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[2]Kentucky Constitution, Article XII, §8 (1792).

[3]Kentucky Constitution, §9 (1891).

[4]Petitioner's brief, page 21.

[5]C. J. Bronston: " 'Is libel worse than murder?' " I answer the gentleman, in the presence of this intelligent audience, yes, it is worse than murder. You may kill a man and put him away beneath the sod, and there, over his mouldering body, may grow the green grass, and his children and grandchildren may come about and shed a tear; but take from him his reputation and he is a living corpse walking among men—a stench in their nostrils—a being subject to the scorn of the human race. Worse than murder; because the man who strikes down his fellow-man invokes at once the anger and determination of every human being to prosecute him; but let him, by the insidious means of the press, strike down a man's character, and the people have their prurient taste gratified for a moment, and then they forget, as it were, and leave the poor wretch to wander degraded throughout his life." Vol. I, Debates of the Kentucky Constitutional Convention of 1890, page 543.

adequately defined in the opinions of our highest state court so that a person of ordinary understanding could know the type of conduct prohibited. It is claimed there are varying definitions of the crime in the Kentucky cases, and that the decisions are not uniform or consistent in interpreting and applying the law as to this offense. In order to dispel any doubts arising from such assertions, it is necessary to review the cases decided by our Court of Appeals involving criminal libel.

In the first Kentucky case of record, *Tracy v. Commonwealth*, 87 Ky. 578, 9 S.W. 822 (1888), the validity of an indictment for criminal libel of public officials[6] was questioned on the ground that it did not meet the general requirement of the Criminal Code that acts constituting the offense must be stated in such a manner as to enable a person of ordinary understanding to know the nature of the crime charged. The indictment charged that defendant "willfully and *maliciously* composed, and caused to be printed and *published* of and concerning (the sheriff and circuit judge) certain *false*, scandalous and *malicious libel*", setting out the particular matter. The Court of Appeals upheld the indictment because the averments therein "constituted a complete offense" and apprised the defendant of every fact necessary to constitute the crime with which he stood charged.

It was thus made clear in 1888 that the common law

[6]Defendant was convicted and fined $500 for causing to be published in a newspaper a libelous article regarding the sheriff which made him a corrupt official, and a statement regarding the circuit judge that his ruling in a certain condemnation case was "unjust and a disgrace to his position. He denied me the right of a trial by jury because he did not want it out of his hands, as he could not decide in favor of the railroad company, as he has done." The appellate court observed that "it is evident that the defendant, in publishing the libelous matter in which he maligned the judge and miserpresented his official conduct, went beyond the bounds of legitimate criticism. . . ."

offense of criminal libel in Kentucky was defined as the publication with malice of a false and defamatory writing constituting a libel per se. The essential elements of the offense were: (1) a writing defamatory per se, (2) publication, (3) falsity, and (4) malice. The Court in its opinion remarked that "the truth may be pleaded under our constitution and laws in justification of the offense."

In the *Tracy* case[7] the Court commented, in connection with whether different offenses were involved in a single publication:

> "Libel is a public wrong. The publication is, in effect, a breach of the peace. It produces public mischief, and for that reason is an indictable offense. It is a breach of the peace, whether published as to one or more persons; the more persons affected by the libelous matter, the greater the public wrong; but the one act of publication is the libel complained of. . . ."

The view that it is presumed that publication of a libel will result in a breach of the peace may have been a reflection of the early common law rationale. On the other hand, the Court may have been taking note of existing conditions, since the framers of the present Kentucky constitution adopted in 1891 apparently believed breaches of the peace occurred often enough as a result of wounded honor, and constituted such a serious matter, that it was necessary to place in the Constitution an express prohibition against dueling.[8] Ken-

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[7]Tracy v. Commonwealth, 87 Ky. 578, 9 S.W. 822 (1888).

[8]"Any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept or knowingly carry a challenge to any person or persons to fight in single combat, with a citizen of this State, with a deadly weapon, either in or out of the State, shall be deprived of the right to hold any office of honor or profit in this Commonwealth; and if said acts, or any of them, be committed within this State, the person or persons so committing them shall be further punished in such manner as the General Assembly may prescribe by law." Kentucky Constitution, § 239 (1891).

tucky officials even today must take an oath that they have not fought a duel or acted as second in a duel.[8]

In the next Kentucky case, *Smith v. Commonwealth*, 98 Ky. 437, 33 S.W. 419 (1895), the defendant did not question the definition of the offense or the sufficiency of the charge but asked a reversal of his conviction[10] on the grounds that the term "malice" was not used in instructing the jury, and the jury was not told to acquit if they had a reasonable doubt as to the truthfulness of the publication. It was held that the jury was properly instructed as to the element of malice where a finding of guilt was authorized if it was believed from the evidence that the material in the articles was wholly false and libelous, "and was so known to be false and libelous when published by the defendant." The opinion states:

> "Certainly, to publish of and concerning an official false, defamatory, and libelous words, importing a felony and disgraceful and infamous practices, and *known to be false and libelous by the publisher*, and published by him for the sole purpose of injuring, scandalizing, and vilifying the officer, is conclusively malicious in fact as matter of law; and the jury was told that they must believe the publication was so made before they could find the accused quilty." (Emphasis ours.)

The decision in the *Smith* case equated knowledge of falsity with "malice", as concerns criminal libel of a public official. In this respect it is in accord with the holding of this Court in *Garrison v. Louisiana*, 379 U.S. 64. On the question of

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[9]Kentucky Constitution, §228 (1891).

[10]Defendant was convicted of libel for publishing in his newspaper libelous and defamatory matter concerning the collector of internal revenue for the 5th district of Kentucky, which presented the official to the public "as a felon, a violator of the law and as being a degraded and unworthy man and official." A fine of $877.50 was imposed, the odd figure being the result of a division by 12 of the estimates of the jurymen.

truth as a defense, the Kentucky Court held that the instructions were sufficient to set out defendant's absolute right to acquittal upon a showing of truth:

> "In subsequent instructions, the jury were told that, if they believed the statements of the publication to be true, they must find the defendant not guilty . . . If the jury had entertained a doubt of the truth of the published statements, or been inclined to believe the publication to be true, they must have given the accused the benefit of it, and found him not guilty."

Browning v. Commonwealth, 116 Ky. 282, 76 S.W. 19 (1903) involved a purely private libel totally unrelated to public affairs.[11] No question was raised concerning the definition of the offense or its elements, or the sufficiency of instructions as to these elements. The Court held that an allegation that a person will steal property if he has an opportunity is libelous per se, although not constituting a charge of commission of a crime:

> "It does not require the imputation of a crime to render a publication libelous. Any defamatory words calculated to degrade or injure the reputation of a person in society, when written and published maliciously, are libelous. Riley v. Lee, 88 Ky. 603, 11 S.W. 713, 21 Am. St. Rep. 358; Allen v. Wortham, 89 Ky. 486, 13 S.W. 73. And the law is equally well settled that, where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society. 1 Starkie, 211. In Duncan, etc., v. Brown, 54 Ky. 186, it was held prima facie libelous

[11]Defendant was convicted under an indictment for criminal libel charging that he had written a letter to another person in which he requested the addressee to protect certain equipment because "Beard will purloin all of the outfit if he has a chance at it." The jury fixed the punishment at a fine of $85.

> to write and publish of one 'that he would put his name to anything that another would request him to sign that would injure a third person'."

In regard to defendant's claim of a privileged communication, the Court in the *Browning* case held that defendant had not attempted to show any facts which reasonably induced him to believe his property was in danger from Beard, and in any case a showing of malice apart from the act of publication overcame any such privilege.

In *Commonwealth v. Duncan*, 127 Ky. 47, 104 S.W. 997 (1907) the sole question presented was the sufficiency of an indictment charging that defendant maliciously wrote and caused to be published in a newspaper a certain article containing false and defamatory statements about a public official, all of which statements were known by the defendant to be false.[12] The indictment charged all the essential elements of the crime and was held sufficient. In regard to whether the published statements were libelous per se as to the particular official, the Court stated:

> "The rule as to what is libelous is thus stated in 2 Roberson, Crim. Law, 586: 'Libel is an offense at common law, and is defined to be any false and malicious publication which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive or to bring him into contempt, hatred or ridicule, or which accuses him of any crime punishable by law, or of an act odious and disgraceful to society.' In 2 Bishop on Crim. Law, § 907, the offense is defined in these words: 'The offense of libel is founded on the doctrine of attempt. It is any

[12]Defendant caused an article to be published in a Lexington newspaper addressed to the grand jury in which it was stated that the clerk of the Fayette quarterly court had for four years been busily engaged in changing and falsifying the public records of the county to protect members of the fiscal court who were referred to as "the plunderers of the county." The trial court sustained a demurrer to the indictment and the Commonwealth appealed.

representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.' The publication in question certainly tended to bring Pearce into contempt and ridicule. It was manifestly calculated to create a disturbance of the public peace. . . ."

In *Yancey v. Commonwealth,* 135 Ky. 207, 122 S.W. 123 (1909) there was no question as to the definition or elements of the offense. The Court reversed a conviction of a county judge for criminal libel under an indictment charging that he maliciously sent letters to former members of a grand jury making false and libelous statements about the Commonwealth's attorney, which were known to be false at the time of publication.[13] Since the libelous publication was made in connection with an attempt to obtain support for a petition being circulated to have the Commonwealth's attorney impeached by the Legislature, on the basis of a belief in good faith that he was incompetent, it was held that in the absence of an allegation that defendant was acting without reasonable grounds the writings belonged to the class of communications regarded by the law as "absolutely privileged."

In *Cole v. Commonwealth,* 222 Ky. 350, 300 S.W. 907 (1927) the only question raised on appeal was the sufficiency of three indictments charging that defendants had committed the offense of libel by maliciously publishing in a newspaper a certain article containing false and malicious statements about a circuit judge, for the purpose of injuring his good

[13]The letters mailed by the county judge asked that the recipients sign a petition or execute affidavits that while they were members of the grand jury the Commonwealth's attorney was "constantly and habitually drunk", had to be arrested and returned to the jury room to sign indictments, and "has continuously shown his incompetency and unfitness for the office." The jury found defendant guilty and imposed a fine of $500.

name and fame as a public officer and citizen, and to expose him to public hatred.[14] The indictments were held sufficient since they charged the essential elements of a libel per se, falsity, and publication with malice. In discussing what constitutes libel per se, the Court stated:

> "Libel is an offense at common law, and is defined to be any false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society. Commonwealth v. Duncan, 127 Ky. 47, 104 S.W. 997, 31 Ky. Law Rep. 1277. Language concerning one in office which imputes to him a want of integrity or misfeasance in his office, or a want of capacity generally to fulfill the duties of his office, or which is calculated to diminish public confidence in him as an officer, or charges him with a breach of some public trust, is actionable. Townsend on Slander and Libel, § 196; Dixon v. Chappell, 133 Ky. 663, 118 S.W. 929. . . ."

It should be noted that the Court in the *Cole* case acknowledged the right of the press and the public to criticize in a "caustic or severe" manner the acts of public officers, as a part of the privilege of fair comment, but pointed out that this did not apply to false and defamatory *statements of fact:*

> "It is true that the interests of society and the efficiency of the public service require that the acts of all officers may be fairly criticized by the press

[14]The newspaper article alleged that the judge (later Governor of Kentucky) had assisted the Commonwealth attorneys and other citizens in securing evidence to convict three negroes charged in his court with rape, had called soldiers to be present and aid the court against defendants and would not give defendants a fair trial but would see that they were quickly convicted and speedily hanged regardless of the circumstances. Defendants admitted the falsity of the statements. Their punishment was fixed at a fine of $250 each.

and the public. . . . *if the publication is not a comment or criticism but a statement of fact, the rules to be applied are those applicable to any other case of defamation.*" (Emphasis ours)

The foregoing review of Kentucky criminal libel decisions leads to the conclusion that the offense was and is defined with such certainty that a person of ordinary understanding can comprehend the type of conduct condemned. While the opinions do not use identical language or cite the same authorities, and while different questions were presented, it is obvious from the holdings of the cases that the essential elements of the common law offense in Kentucky are: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice. In the only case in which the definition of the element of "malice" was questioned by the defendant[15], it was held that in regard to publications concerning public officials and public affairs the actual malice required is shown by knowledge of falsity of the publication.

The Court of Appeals in its opinion in this case did not redefine the crime or change any of its elements, but merely restated in concise fashion the fundamental requirements of the offense as manifested by the earlier decisions. (R. 149).

The holdings in the Kentucky criminal libel cases are not inconsistent or contradictory, and it may be said that the common law crime has by a number of consistent interpretations of the Court of Appeals acquired a meaning sufficiently definite that all within its purview have a clear understanding of its application. The Kentucky opinions serve to establish that the conduct prohibited is the publication with malice of a false written statement which tends to blacken the memory of one who is dead or to degrade or injure one who is alive by imputing to him an act or condition which would bring him into public contempt, ridicule,

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[15]Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895).

hatred or disgrace. And in regard to publications concerning public officials or public affairs actual malice must be shown by proof of knowledge of falsity of the statement or a high degree of awareness of its probable falsity.

The Kentucky opinions also serve to indicate the conduct which is permissible. The press and members of the public may comment upon and criticize the acts of public officials in a "caustic and severe" manner as a part of the privilege of fair comment.[16] The publication of a statement of fact which is defamatory per se is beyond the reach of the law if it can be shown to be true.[17] In connection with public affairs, a factual statement which is defamatory may be published with ill will if it is true, and even if it proves to be false the publisher has not been guilty of criminal libel unless he knew it was false when he published it or had a high degree of awareness of its probable falsity. There is also recognition of an absolute privilege.[18]

The common law offense of criminal libel may be said to be fairly broad as concerns the words which could be classified as defamatory per se. It is not possible to specify every combination of words which would by themselves tend to injure a person's reputation in the eyes of the public and thereby hurt him in society or in holding office or earning a livelihood. Although the particular words and combinations of words which would satisfy this element of the offense may be quite numerous and varied, this is not a new concept and has acquired a sufficiently definite meaning through a large number of common law decisions concerning what language is "actionable per se" in civil cases.[19] As to public officers generally, the definition in *Cole v. Commonwealth*, 222 Ky. 350, 300 S.W. 907 (1927) furnishes an adequate

[16]Cole v. Commonwealth, 222 Ky. 350, 300 S.W. 907 (1927).
[17]Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895).
[18]Yancey v. Commonwealth, 135 Ky. 207, 122 S.W. 123 (1909).
[19]Vol. 12 A, Kentucky Digest, 329-410.

standard for determining libel per se. Persons of ordinary intelligence are undoubtedly aware of whether what they are writing contains factual assertions which would bring another person into public contempt, ridicule or disgrace. And of course they can appreciate the difference between a truthful utterance and a lie.

It is admitted that some defamatory publications would not be as serious in impact as others. In the present case the defamation concerned public officials and was calculated to incite a breach of the peace when injected into the bitter and explosive miners versus coal operators situation prevailing at the time. This is in contrast with the private libel involved in *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19 (1903). However, the variance in the gravity of the offenses addresses itself to the discretion of the jury in fixing the punishment. Since this is a common law crime the jury under KRS 431.075 has a range of possible penalties extending from a fine of one dollar to the maximum sentence of a $5,000 fine and twelve months in jail.

Petitioner maintains that communication cannot be punished unless it is of such character that its utterance would create a "serious and present or imminent danger" of substantive evil to the state or to the general welfare. *Pennekamp v. Florida*, 328 U.S. 331; *Terminiello v. Chicago*, 337 U.S. 1. It is argued that the Kentucky criminal libel law includes within its scope publications which are not likely to produce any harm to the public.

It is admitted that the Kentucky common law offense is designed to protect individual reputation. It is questionable whether it extends to "group libel". It is certain that it does not require proof that the publication tended to incite riots or public disturbances.

The "clear and present danger" standard is not applicable to the Kentucky criminal libel law since libelous communi-

cations are not within the protection of the First and Fourteenth Amendments. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 it was stated:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U.S. 296, 309-310."

And in *Beauharnais v. Illinois*, 343 U.S. 250, 266, Mr. Justice Frankfurter wrote for the Court:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

It cannot, of course, in view of the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 and *Garrison v. Louisiana*, 379 U.S. 64, be argued that it is sufficient to put a label of

"libel" on publications and permit punishment without satisfying relevant constitutional standards. However, the Kentucky common law crime satisfies the constitutional limitations noted by the Court in the *Garrison* case since truth is a complete defense in a prosecution for defamatory statements involving public officials and their conduct of public business. Also, "actual malice" with reference to statements relating to public officials has been defined by the Court of Appeals to mean knowledge of falsity, which would no doubt include the equivalent of reckless disregard for the truth. *Smith v. Commonwealth,* 98 Ky. 437, 33 S.W. 419 (1895).

The Court in *Garrison v. Louisiana,* 379 U.S. 64 recognized the validity of prosecutions for criminal libel involving publications concerning officials or public affairs, where statements libelous per se were published with knowledge of their falsity or with a reckless disregard for the truth. The justification for imposing criminal sanctions in cases of this type is the recognition that calculated falsehoods could be used as a tool to unseat a public servant or even topple the government.

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the constitution. For the use of the known life as a tool is at once at odds with the premises of democratic govern-

ment and with the orderly manner in which economic, social or political change is to be effected. . . ."[20]

The Kentucky common law offense extends to purely private libels unrelated to public affairs.[21] The original justification for making libel as to private persons a crime was that publication of defamatory material tended to result in a breach of the peace. There is authority that in Kentucky this premise may have had some validity as late as the beginning of the Twentieth Century.[22] Although Kentuckians are by tradition a race of fighting and feuding men, it appears that the breach of the peace rationale has been put aside[23] and it is now clear that the only justification for imposing criminal sanctions for defamation of private parties is the protection of individual reputation.

The Court in *Garrison v. Louisiana*, 379 U.S. 64, 69-70, quoted with approval the explanation of the American Law Institute Reporters as to why the draft of the Model Penal Code omitted any criminal libel statute on the Louisiana pattern:

> " 'It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions

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[20]Garrison v. Louisiana, 379 U.S. 64 at 75.

[21]Browning v. Commonwealth, 116 Ky. 282, 76 S.W. 19 (1903).

[22]Kentucky Constitution, §239 (1891).

[23]Opinion of the Court of Appeals, R. 150: "the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a 'breach of the peace' or to induce others to commit a public offense."

and the near desuetude of private criminal libel legislation in this country . . .' "

The view that private libel and personal calumny is no longer appropriate for penal control is unsound. A civil suit for damages may be an adequate threat to deter deliberate or reckless character assassination on the part of responsible publishers of means, but it connot serve to guarantee relief from this positive evil in the case of those who are immune to judgments by virtue of being of insufficient worth. It surely cannot be true that the community's sense of security is not disturbed today by the thought that any member in private life could have his reputation intentionally, maliciously and systematically demolished by a succession of calculated falsehoods published by impecunious wrongdoers. The threat of the remedy immediately and inexpensively available by a criminal prosecution is an effective deterrent to the commission of such real harm. It has not, of course, been put to much actual use and probably will always be rare. But the mere shadow of the criminal sanction serves a worthwhile purpose in this type of case. We cannot say that wrongful actions can no longer be punished as a crime simply because statistics show there have been few prosecutions.

B. THE INSTRUCTIONS TO THE JURY IN THIS CASE PRESENTED ALL THE ELEMENTS OF THE OFFENSE AND PROPERLY DEFINED THE CRIME. THE INSTRUCTION THAT CRIMINAL LIBEL IS A WRITING CALCULATED TO CREATE DISTURBANCES OF THE PEACE WAS FAVORABLE TO PETITIONER.

The trial court in its instructions to the jury required it to believe from the evidence beyond a reasonable doubt that the prosecution had proved the essential elements of publication, falsity and malice. (R. 126). In the principal

instruction the court informed the jury that it must believe that the particular statements and words in the article were libelous, in that the chief of police, sheriff and newspaper owner were presented to the public as a felon, a violator of the law and as being degraded and unworthy persons, and were held up to public ridicule and contempt. (R. 123, 125). All of the essential elements of the crime were thus presented to the jury and the instructions defined the crime in accordance with previous opinions of the Court of Appeals.

It might be noted that the jury was instructed that truth of the statements was an absolute defense, and that they must find from the evidence that the statements in the articles and the legitimate inferences to be drawn therefrom were not only false and libelous but "was so known to be false and libelous when published by the defendant." (R. 125).

Petitioner's complaint regarding the unconstitutionality of the charge to the jury is based on the third instruction (R. 125) which reads:

> "The court further instructs the jury that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable."

The instruction fitted the evidence in this case in that the particular writing and circumstances under which it was published were such as to show that it was calculated to create disturbances of the peace or lead to unlawful acts. The pamphlet styled "Notes On A Mountain Strike" is replete with references to the violence implicit in the labor controversy in Perry County.[24]

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[24] ". . all kinds of artillery—pistols, high powered rifles, and, in one car, a machine gun! . Last month 4 pickets were shot while on the picket line at one mine . . . Since then the pickets have armed themselves . . . And even with the arms there is the danger of dynamite . . . I saw the remains of a picket leader's home which was blown up." (R. 134).

The purpose of the publication was to induce readers to choose which side of the controversy they favored and to take action in pursuance of their choice.

> "The old union song is now reality here—'Which side are you on, boys? . . .' Sides are being chosen for the showdown, which is on the way and not far off." (R. 135).

In presenting the relative merits of the contesting factions, petitioner described the striking miners as good people who desired only to earn enough to feed and clothe their families. It was alleged that the strikers were being subjected to monstrous abuses by the unconscionable mine owners who were supported in their illegal acts by the sheriff, the city and state police, and even the FBI.[25]

There can be no doubt that the publication was calculated to promote disturbances and align neutral persons with the strikers against the allegedly corrupt forces of the law.

The effect of the instruction to which petitioner objects is that even if the jury found that the statements were defamatory per se, false and published with malice, they could not consider the offense proved unless they further found that the material was calculated to create a disturbance of the peace, etc. The possible impact of the defamatory words is not required to be shown under the holdings of the Kentucky cases. The instruction favored petitioner since it

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[25] ". . the operators cheat each miner out of at least $10 a day . . . The operators consider mules and ponies to be more valuable than men . . . death threats to any worker who tries to organize . . many brutal beatings . . . These men have been threatened and intimidated by operators and their gun-thugs. There is a price of $8,000 on the heads of the strike leaders . . . The Sheriff, State Police, City Police have proven that they are either operators themselves (as is the High Sheriff) or in cahoots with them. The gun-thugs and operators are murderous and crooked men who have starved men to death, and their families with them . . . the FBI has been here intimidating and harassing the pickets." (R. 130-135).

required the jury to find something which was not necessary to be established in order to return a verdict of guilty. Criminality under the Kentucky law is not based on the tendency of the published material to incite public disorders.

POINT II

THE CRIMINAL LIBEL LAW AS APPLIED BY THE TRIAL COURT WAS CONSTITUTIONAL. THE AFFIRMANCE OF PETITIONER'S CONVICTION WAS NOT UNDER A DIFFERENT INTERPRETATION OF THE LAW THAN THAT GIVEN IN THE TRIAL COURT'S CHARGE TO THE JURY.

The argument that the Kentucky common law offense of criminal libel is constitutional has been made under Point I-A. The trial court properly presented to the jury the four essential elements of the crime.

The Court of Appeals did not change the law by its opinion in this case or rule that the offense as defined by the trial court was unconstitutional. It merely restated the elements shown to be essential by previous decisions. It cannot be contended that the appellate court held that it was unconstitutional to give an instruction relative to the tendency of the defamatory material to cause a breach of the peace. The trial court's instructions more narrowly defined the crime than was necessary.

POINT III

THERE WAS SUFFICIENT EVIDENCE THAT THE STATEMENTS MADE ABOUT MRS. NOLAN WERE FALSE.

The portion of the publication concerning Mrs. W. P. Nolan (R. 123) alleges in substance that she and her news-

paper were guilty of a violation of a public trust in that, because of her vehement feelings against labor, she refused to give to the striking miners the food and clothing which had been received by her newspaper for their express benefit. It was asserted as a fact that (1) all of the aid received by the newspaper was supposed to be delivered to the pickets, (2) Mrs. Nolan was vehemently against labor, (3) because of her feelings against labor she saw to it that none of the food and clothing was given to the pickets and (4) the food and clothes are either still under lock and key or have been given out to the scabs.

There was sufficient evidence that the statements made about Mrs. Nolan were false. The funds and material that came to the newspaper were not earmarked solely for the benefit of the pickets. People sending in the contributions did not mention the miners and simply said "Help the needy people." (R. 57). Various committees distributed the money, food and clothing upon the basis of need, and at the request of the Governor prorated it among several counties. (R. 50, 54). None of the needy people were asked whether they were a picket or a scab. (R. 52).

Mrs. Nolan denied that she was ever vehemently against labor. (R. 62). Her newspaper had always tried to keep down violence and promote harmony in the community. (R. 68). The statement that "none of the food and clothes" went to the pickets was false. Mrs. Nolan testified that she received fourteen truckloads of food and clothing and the pickets got all of two truckloads at the outset. (R. 65). Many of the pickets would go right in the warehouse and help themselves to food and clothing. (R. 51). All of the clothing was distributed to needy people (R. 51) except some old clothes in the warehouse that nobody wanted. (R. 55).

POINT IV

THERE WAS SUFFICIENT EVIDENCE THAT THE STATEMENTS ABOUT THE CHIEF OF POLICE AND THE SHERIFF WERE MADE WITH ACTUAL MALICE CONSISTING OF A RECKLESS DISREGARD FOR THE TRUTH.

The holdings of *New York Times v. Sullivan,* 376 U.S. 254 and *Garrison v. Louisiana,* 379 U.S. 64 require for actual malice a showing of knowledge of falsity of the material published or that it was published with a reckless disregard for the truth.

The evidence in this case is sufficient to establish that petitioner made statements about the public officials with a reckless disregard for the truth and is chargeable with a high degree of awareness of their probable falsity.

The particular statements regarding the sheriff and chief of police must be considered in proper context by considering the nature of the pamphlet, "Notes On A Mountain Strike." It is evident from the tone of the publication and the many reckless assertions set out therein that the writer was not interested in the truth, but was incorporating anything and everything that might serve to make the reader cast his lot with the strikers against the operators and peace officers.

Petitioner was not a resident of Kentucky and was a stranger to the community subject to stress by a labor-capital struggle. He came to support the pickets and associated only with this faction. He obtained his information from the strikers without bothering to question anyone else, much less the parties defamed. He did a part of the work on his publication in the home of the leader of the pickets, Herb Stacy, which adjoined a beer tavern. (R. 25).

Petitioner was an intelligent, educated man who must

surely have been highly aware of the probable falsity of a number of cruel and scandalous statements which he made in "Notes On A Mountain Strike." It is clear that since the defamatory statements served his purpose he did not care whether they were true or false.

> It was stated in *Keogh v. Pearson*, 244 F. Supp. 482, 485:
> "As defamatory statements become more and more vindictive, cruel and scandalous, they increasingly give cause to the printer and publisher to take care. He who tends to disregard the vengeful nature of his printing, tends to recklessly have disregard for the truth. . . . There would be a time in which the publisher would be forced to investigate the truthfulness of obviously defamatory material."

POINT V

THERE WAS SUFFICIENT EVIDENCE THAT PETITIONER PUBLISHED THE LIBELOUS MATTER.

The record shows that petitioner not only wrote but mechanically reproduced the libelous pamphlet bearing the date March 22, 1963 in large quantities, and had prepared copies for mailing to numerous people. (R. 28).

Specific evidence of publication is found in the testimony of City Policeman C. W. Begley who on the night of March 26, 1963 was making a routine inspection of beer taverns with Sergeant Cook when they entered Stacy's Tavern and saw petitioner and four or five others grouped around a table which had some pamphlets on it. Officer Cook saw the pamphlets and asked what they were and and petitioner said "reading material." Petitioner then asked Begley if he would like to have one, and when Begley assented, petitioner got a copy out from under the table and handed it to him. Cook was also given a copy. Begley stated that petitioner

"was free to give them to us. Wanted us to take one and read it." (R. 80).

The officers returned to the police station after their evening patrol and when Chief Luttrell came on duty the following morning he was shown a copy of the pamphlet which caused him to send Officer Asher to Stacy's Tavern to see if additional copies could be obtained. (R. 87). Asher testified that a copy was given to him voluntarily when he asked "Do you care if I have one?" (R. 89, Q. 10).

The evidence is sufficient to establish that petitioner was sitting at a table in a public tavern stapling together copies of "Notes On A Mountain Strike" and distributing prepared copies to anyone who came into the tavern and expressed curiosity as to what the pamphlet might be about. Petitioner voluntarily gave copies of the pamphlet to the officers and urged them to read it. There can be no question about there being proof of publication.

POINT VI

IN ORDER TO PROTECT DEDICATED PUBLIC SERVANTS FROM BEING UNSEATED AND THE GOVERNMENT FROM BEING TOPPLED BY CALCULATED FALSEHOODS, CRIMINAL SANCTIONS MUST BE APPLICABLE TO DEFAMATORY STATEMENTS CONCERNING PUBLIC OFFICERS PUBLISHED WITH KNOWLEDGE OF FALSITY OR RECKLESS DISREGARD FOR THE TRUTH.

The prevailing view of this Court set forth in *Garrison v. Louisiana*, 379 U.S. 64 is that calculated falsehoods do not further the fruitful exercise of the right of free speech, and the known lie deliberately published about a public official does not enjoy constitutional protection. This concept is

and must be sound if we are to be protected against use of the "big lie technique" used in propaganda, by which outrageous lies are ultimately accepted by the public as true if asserted often enough and loudly enough. As the Court noted, at the time of adoption of the First Amendment there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to topple an administration.

CONCLUSION

The judgment of the Court of Appeals should be sustained since the Kentucky common law of criminal libel is sufficiently defined in prior opinions to enable a person of ordinary understanding to know with reasonable certainty the conduct prohibited. The Kentucky common law offense satisfies the relevant constitutional standards prescribed by this Court in criminal libel cases.

The trial court's definition of the crime in its instructions to the jury was in accordance with the basic requirements set out in prior opinions of the Court of Appeals, and was not unconstitutionally vague. The trial court instructed on a narrower interpretation of the crime than was necessary for conviction, and petitioner was favored in this respect.

There was sufficient evidence to establish the elements of actual malice and publication. The statements concerning Mrs. Nolan were false.

This Court should not depart from its ruling that criminal sanctions may be imposed for defamatory publications concerning public officials which were known to be false when published or were published with a reckless disregard for the truth.

April 9, 1966.

Respectfully submitted,

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